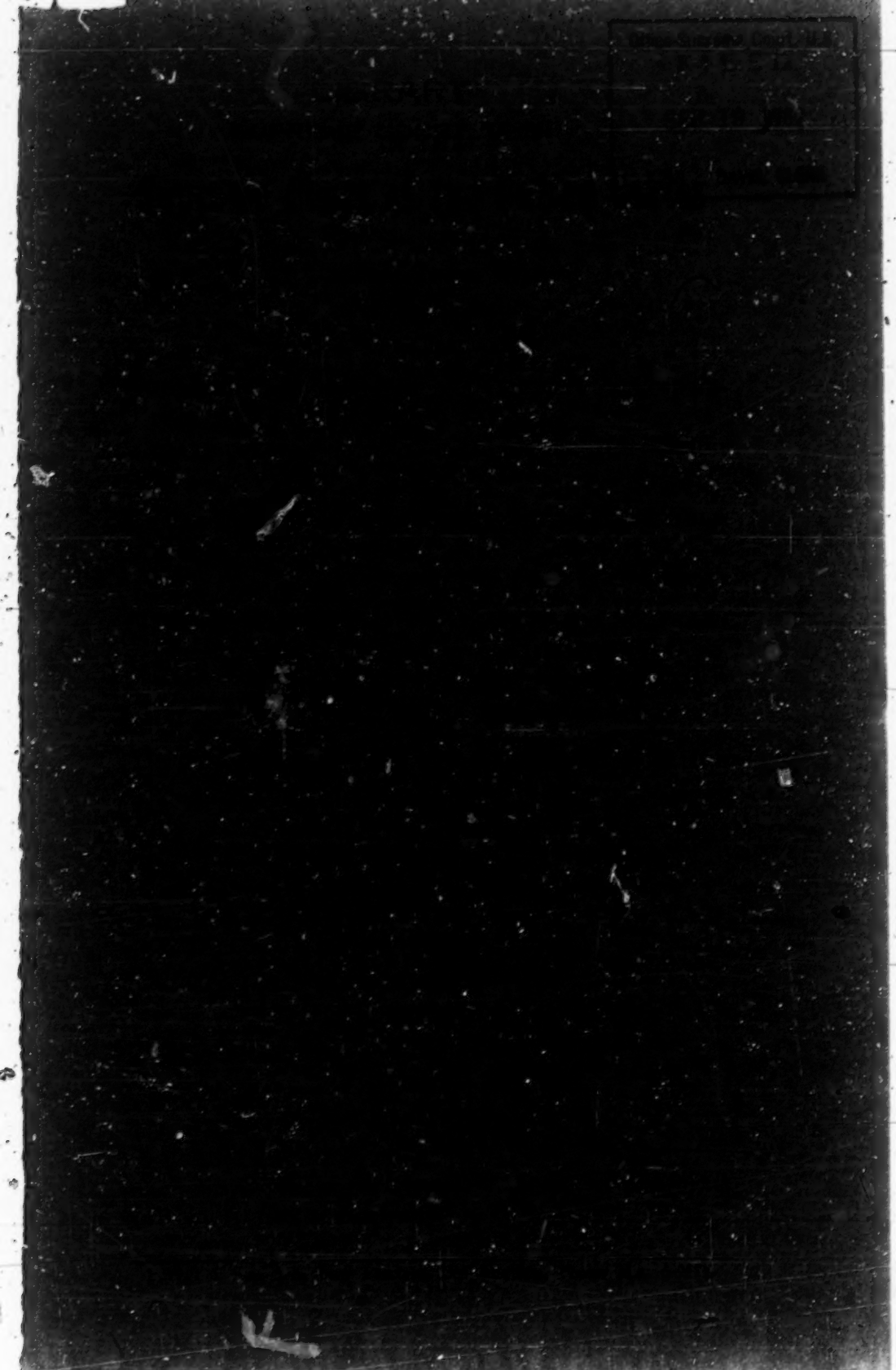

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

SOUTHERN CALIFORNIA EDISON COMPANY, a Corporation,

Appellant,

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee,

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,

Real Parties in Interest.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 15 of the revised rules of the Supreme Court of the United States, appellant submits herewith its statement as to the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of California, in civil action S. F. No. 20773, denying a hearing on a Petition for Writ of Review or Mandamus, from a Decision, and Order, of the Public Utilities Commission of the State of California.

INTRODUCTION.

The instant appeal is taken from a judgment of the California Supreme Court affirming a decision of the Public Utilities Commission of the State of California ("California Commission") granting a certificate of public convenience and necessity for construction of a natural gas pipeline project, termed "Rock Springs."[1] As proposed, the Rock Springs project is designed to serve, in a large measure, a market already committed by contract to another source of natural gas service. The market in question consists of a substantial portion of the natural gas load of appellant, the Southern California Edison Company ("Edison"). Edison is committed by contractual arrangements to natural gas service that would be provided by another natural gas pipeline project, termed "Pemex", or Edison-CGT. The "Pemex"[2] project was pending before the California Commission when it issued its decision certificating the "Rock Springs" project. At that time the "Pemex" proceedings had not been completed, for some testimony and evidence were yet to be presented.

The problem, in the case at bar, thus arose in a situation where the California Commission had pending before it two separate pipeline projects, both of which were relying upon a market showing predicated in a large part upon the identical market—namely, the Edison requirements.

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[1]So called by reason of its routing near Rock Springs, Wyoming.

[2]A contraction of the name Petroleos Mexicanos, the decentralized institution of the Mexican government dealing in oil and gas on behalf of that country.

The Commission recognized that one of the principal issues involved in the Rock Springs proceeding was that of the economic feasibility of the project at issue in that proceeding was the question of whether or not the Rock Springs project would be economically feasible without the Edison load; yet in certifying that project the California Commission refused to disclose whether it was certifying it as economically feasible only if the Edison load were served thereby, or if it had determined that the project would be economically feasible even without the Edison load. As was admitted by the parties in the proceeding, both projects could not properly be determined as economically feasible upon the basis of each serving one and the same Edison market. Since, at the time of its decision in the Rock Springs case, the proceedings before the California Commission upon the Pemex project had not been concluded and all of the testimony and evidence had not been presented there clearly was a prejudgment of the Pemex project (the economic feasibility of which was based upon the same market), in violation of the requirements of due process of law under the constitutional guarantees, if the California Commission in certifying the Rock Springs project did so only in reliance upon that project's serving the Edison load. The Commission made no finding upon the economic feasibility of the Rock Springs project without the Edison load, which finding would be necessary to its being certified without an unconstitutional prejudgment of the Pemex project.

Furthermore, your appellant, Edison, has been and now is, a customer of the natural gas companies that would operate the California portion of the "Rock Springs" project, and is also an applicant before the

California Commission for authorization to implement the arrangements for the California portion of the "Pemex" project. Appellant therefore has a dual interest in a proper determination by the Commission as to the "economic feasibility" of the "Rock Springs" project.

THE OPINION BELOW.

The judgment of the California Supreme Court denying the Petition for Writ of Review or Mandamus was entered by minute order, without opinion, on January 31, 1962. It is reported in 57 Advance California Reports No. 10, dated February 9, 1962, at Minutes, page 1. A copy of the Minute Order is attached hereto as Appendix "A".

The judgment affirmed a decision of the California Public Utilities Commission, contained in a "Supplemental Opinion" identified as Decison No. 62117, dated June 6, 1961, and reported in 58 California Public Utilities Reports 746. This opinion supplemented previous rulings of the Commission, identified as Decision No. 61261, dated December 28, 1960, and reported in 58 California Public Utilities Commission Reports 374, and Decision No. 54955, dated January 5, 1960, and reported in 57 California Public Utilities Commission Reports 485. Copies of these three Decisions were submitted to the California Supreme Court as Exhibits A, B and C, to the Petition for Writ of Review or, in the Alternative, for Writ of Mandamus. This Petition, and the Exhibits, are part of the Record before this Court.

GROUNDS FOR JURISDICTION.

1. This appeal concerns Decisions of the Public Utilities Commission of the State of California, granting certificates of public convenience and necessity to the Southern California Gas Company and the Southern Counties Gas Company of California (sometimes called "Gas Companies"), for the construction and operation of the California segment of an interstate natural gas pipeline project, which would originate outside of California.

Appellant Edison, as the largest "interruptible" customer of the Gas Companies, along with other parties, appeared before the Commission as an interested party, and questioned whether the proposed pipeline project would be "economically feasible" without the Edison load. Appellant informed the California Commission that to obtain an adequate long-range fuel supply, so as to be able to continue to provide satisfactory electric service, it was attempting to obtain an independent supply of natural gas from sources outside California, and that in the future the two Gas Companies might not continue to supply Appellant with natural gas service as in the past. During the pendency of the proceeding, applications were filed with the California Commission by Appellant, and by the California Gas Transmission Company, for the required authorizations in connection with such independent supply, the Pemex Project.

In the Decisions that were affirmed by the California Supreme Court, whose judgment is the subject of this appeal, the California Commission did not make any findings on the principal issue of economic feasibility,

nor on the inclusion or exclusion of your Appellant in the market relied upon for certification of the Rock Springs project, nor on other principal issues litigated in the proceeding, and necessary to its determination. A petition of your Appellant for Rehearing, on the ground that the Decisions constituted a denial of due process of law, in violation of the federal constitution, was denied by the Commission, without opinion, by order entered June 27, 1961.

The law of California provides that the California Supreme Court is the sole state tribunal with jurisdiction to review an order or decision of the California Commission. The petition of Appellant for such review, was denied by the state Supreme Court, without opinion, on January 31, 1962. (57 A. C. 10; Minutes, p. 1; Appendix A hereto.) Your appellant filed a Notice of Appeal, in the Supreme Court of the State of California, on April 27, 1962. The time for filing the record, and this Statement, with your Honorable Court, was extended by the State Supreme Courts to September 24, 1962.

2. The California statutes involved in this appeal are contained in the state Public Utilities Code, as follows:

a. Issuance of certificates of public convenience and necessity, by the Commission, after hearing: Sections 1001 to 1006. [Stats. 1951, ch. 764; Sec. 1005 was amended by Stat. 1959, ch. 2109, § 1, p. 4906.]

b. Hearings and Rehearings, by the Commission: Sections 310, 1701, 1705, 1709; and 1731, 1732 and 1733. [(Stats. 1951, ch. 764. Sec. 1705 was amended by Stats. 1961, ch. 118, § 1).]

c, Judicial Review of orders and decision of the Commission: Sections 1756 to 1760. [(Stats. 1951, ch. 764).].

The Constitution of the State of California provides for the state Supreme Court, in Sections 1 and 4 of Article VI, and for the state Public Utilities Commission, in Section 22 of Article XII.

The text of these statutory and constitutional provisions is set out verbatim, in Appendix E hereto.

3. Jurisdiction is conferred upon the Supreme Court of the United States to review the decision of the California Supreme Court by direct appeal, by Title 28, United States Code, Section 1257(2).

4. The following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the California Supreme Court, in this case, on direct appeal:

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290, 42 S. Ct. 106, 66 L. Ed. 239;

Napa Valley Elec. Co. v. Railroad Commission, 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310;

Truax v. Corrigan, 257 U. S. 312, 324, 42 S. Ct. 124, 66 L. Ed. 254;

Southern Ry. Co. v. Virginia, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260.

Reference is also made to *Robertson and Kirkham*, Jurisdiction of the Supreme Court of the United States (1951 Ed.), at pages 21 to 26.

QUESTIONS PRESENTED BY APPEAL.

(1) Whether the statutes of California establishing the procedure for hearings before the Public Utilities Commission of California, as applied by the Supreme Court of California to provide that the Commission is not thereby required to make known its determination of the principal issues litigated and duly submitted for decision, are repugnant to the requirement of due process of law provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States, on a fair hearing.

(2) Whether the provisions of the statutes and the Constitution of the State of California, as applied by the Supreme Court of that State, as not requiring a review by a judicial tribunal of a decision of the State Public Utilities Commission, when said decision does not set forth the determination of the Commission on the principal issues litigated and duly submitted to it for decision, or the determinations of the Commission on the rights of a party to its proceedings under the Constitution of the United States, are repugnant to the requirement of due process of law provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States.

(3) Whether the provisions of the statutes and the Constitution of the State of California, as applied by the Supreme Court of that state, as not requiring that interested parties be given an opportunity for a fair hearing by the Public Utilities Commission of California on an application for a certificate of public convenience and necessity, are repugnant to the requirements of due process of law provided in Article XIV, Section

1, of the Amendments to the Constitution of the United States of America.

(4) Whether the statutes of California, on the procedure for hearings before the Public Utilities Commission of California, as applied by the Supreme Court of California to provide that the Commission is not obliged to conduct a comparative hearing on applications for certificates of public convenience and necessity, for pipeline construction, although said applications are alleged to be mutually exclusive, are repugnant to the requirement of due process of law, provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States, on a fair hearing.

STATEMENT OF THE CASE.

In the Decisions that are the subject of this appeal the California Commission granted the application of two public utility gas corporations, the Southern California Gas Company and the Southern Counties Gas Company of California, for a certificate that the present or future public convenience and necessity required, or would require, the construction in California of an extension to the existing systems of the two Gas Companies which would permit purchase of additional natural gas from the El Paso Natural Gas Company. As stated above, such extension forms part of the pipeline generally described as the "Rock Springs Project."

The two Gas Companies are primarily retail natural gas distribution companies which purchase, distribute and sell, natural gas, in the central and southern parts of the state of California. The California statutes provide that such a corporation shall not begin the

construction of a line, plant or system, nor of certain extensions thereof, without having first obtained a certificate from the California Commission that the present or future public convenience and necessity require or will require such construction. (Public Utilities Code, Sec. 1001.)

The statutes further provide that the California Commission may, after hearing in a contested matter, issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated plant, system, or extension thereof, or for the partial exercise only of the right or privilege, and may attach to the exercise of the rights granted by the certificate, such terms and conditions as in its judgment the public convenience and necessity require. (Public Utilities Code, Sec. 1005.)

An application for such certificate was filed by the two Gas Companies on November 7, 1958, and was amended on November 18, 1959. The application, as amended, requested a certificate for construction of the California segment of a proposed interstate natural gas pipeline, for the purchase of natural gas by the two Gas Companies from the El Paso Natural Gas Company, at the California-Nevada border. The natural gas would be transported to the border by means of a pipeline to be constructed, in part by El Paso and in part by the Colorado Interstate Gas Company. Colorado would construct 155 miles of 34-inch pipeline from Rock Springs, Wyoming, to Provo, Utah, and El Paso would construct 394.6 miles of 34-inch pipeline from Provo to the Nevada-California border.

The natural gas for the pipeline, it was alleged, would be obtained by El Paso from Colorado Interstate, and from the Pacific Northwest Pipeline Corporation, involving possible Canadian sources. If the project were completed, Colorado Interstate would be able to cancel an existing contract that requires purchase of gas from Pacific Northwest, and would also be able to supply a portion of the gas for this project from its own reserve.

A. Proceedings Before the Commission.

At the hearing on this application your appellant, Edison, and other parties contested the validity of an economic feasibility showing, relied upon by the Gas Companies, which was based upon the assumption that the Gas Companies would continue to serve the Edison load as in the past, notwithstanding Edison's contractual arrangements to obtain gas service from another source. Edison is a public utility electric corporation which provides electricity to customers in ten southern California counties, including parts of Los Angeles county. Edison consumes a large quantity of natural gas as fuel in the operation of its steam-electric generating plants. It is the largest customer of the two gas companies, and is served by each of them on one of their "interruptible" schedules. Such schedule provides natural gas service that is subject to termination, or "interruption", from time to time, when the "firm" or "regular" customers need all of the available supply.

Edison informed the California Commission that the service provided it by the Gas Companies under such "interruptible" schedule was unstable, and transient in nature, and did not adequately provide for the present

and future needs of Edison's electric customers. Accordingly, Edison felt obliged to obtain a long term independent supply of natural gas providing it with assured annual volumes of gas so it could continue to provide satisfactory electric service; and that in the future it expected to purchase less natural gas from the two Gas Companies, than in the past.

A late filed Exhibit supplied by the Gas Companies at the direction of the California Commission, purported to show the effect a complete loss of the Edison market would produce upon the sales of the two Gas Companies, but the two Gas Companies continued to contend that the economic feasibility of the project should be supported by a market forecast which included estimated sales of natural gas to Edison, for future years, at volumes similar to sales in past years.

1. Edison Arrangement for Independent Natural Gas Supply: Pemex Project.

During the pendency of the Gas Companies' applications before the California Commission, Edison did in fact enter into contractual arrangements for an independent supply of natural gas. These arrangements provide for the construction of pipelines which will run from the King Ranch processing plant of the Humble Oil and Refining Company in Texas to the town of Reynosa, Mexico (situated across the river from McAllen, Texas), and across Mexico to the vicinity of Mexicali in Baja, California, and from the Mexico-California border to the Edison steam electric generating stations in California. Such system, if fully powered, would be capable of transporting some 750 million cubic feet per day of natural gas. As designed, the

arrangements contemplate the transportation by Tennessee-California Gas Transmission Company, an affiliate of Tennessee Gas Transmission Company, of some 380 million cubic feet of natural gas per day purchased by Edison from producers in the Gulf Coast area of Texas, to the Texas-Mexico border near Reynosa, Mexico, and the transportation of that gas, together with additional Mexican gas (up to 75 million cubic feet per day), through the Mexican segment of the pipeline to the California-Mexican border near Mexicali, after which California Gas Transmission Company, an affiliate of Tennessee Gas Transmission Company, would transport such gas to certain of the Edison steam electric generating stations in California.

Testimony on this Edison arrangement for an independent gas supply was presented to the Commission in the "Rock Springs" proceeding, and applications for authorization of the California segment of the Pemex project were filed with the California Commission on December 5, 1960, by the California Gas Transmission Company, as Application No. 42931, and by the Southern California Edison Company, as Application No. 42932. Hearings commenced in 1961 on these applications and were concluded in May, 1962. Subject to the filing of briefs and oral argument, the matter is now under submission by the California Commission.

Members of the Commission staff, as well as a witness for the two Gas Companies, asserted in the Rock Springs proceeding that the same Edison natural gas requirements could not be used to justify both the "Rock Springs" project, and the pending Pemex project. The staff recommended, to the Commission, that only the

portion of the "Rock Springs" project which provides for delivery over existing facilities should be approved, and that the two Gas Companies should be authorized to negotiate with the gas suppliers on the remaining portion of the project. The staff also filed a motion for comparative hearing of the Rock Springs project, with the Pemex project, Applications 42931 and 42932. The California Gas Transmission Company, and several oil companies, that had appeared in opposition to the Rock Springs project, endorsed the staff motion.

B. Decisions of California Public Utilities Commission.

During the course of these proceedings, the California Public Utilities Commission issued three decisions, setting forth Opinions and Orders on the pending application. Two of these decisions, identified as No. 59455 and No. 61261, were interim in nature. (Exhibits B and C to the Petition for Writ of Review or Mandamus.) The third decision, dated June 6, 1961, Decision No. 62117, was entitled "Supplemental Opinion." (Exhibit A to the Petition for Writ of Review or, in the Alternative, for a Writ of Mandamus, filed in the Supreme Court of California.)

In Decision No. 61261 (Exhibit C to Petition for Writ of Review or Mandamus) the Commission itself phrased the three principal issues posed by the "Rock Springs" application, as follows:

(1) Is the project needed?

(2) Is the project economically feasible?

(3) Does the project connect California to new areas and new sources of gas not now available to it?

The Commission summarized what it found to be the main advantages and disadvantages of the Rock Springs Project, and concluded that, in its opinion, the disadvantages outweighed the advantages, unless the Gas Companies could, among other things, obtain contract revisions or new contracts to eliminate the need for a rate increase, to reduce the period before the project would be economically feasible. The Commission also ordered the applicants to prepare and file a revised economic feasibility study showing the economic supply and requirement situation based on outlook approximately as of the date of the new supply contract. At the time of the issuance of this decision, proceedings were then pending before the California Commission upon the proposed Pemex independent gas supply project.

Subsequently, the Gas Companies filed their "Statement of Compliance" with said conditions and after further hearings and the receipt of separate market showings prepared by the Gas Companies, both with and without the Edison load, the Commission issued Decision No. 62117. (Exhibit A to the Petition for Writ of Review, or, in the Alternative, for a Writ of Mandamus.) It could not be ascertained from this decision whether the California Commission certificated the Rock Springs project in reliance upon the Edison load or in reliance upon a determination that the project was economically feasible without the Edison load.

Appellant Edison timely filed a petition for rehearing, pointing out that the Commission's decision was not supported by a finding on economic feasibility and that in particular the Commission did not state whether

its decision was based upon an assumption that the Gas Companies would or would not continue to supply the Edison load as in the past, and that, because it could not be ascertained from the Commission's opinion whether or not it had concluded that the Rock Springs project was economically feasible without the Edison load, it prayed the California Commission to make a specific finding and determination that would remove any possible ambiguity in this regard so as to avoid an unconstitutional prejudgment of the pending Pemex proceeding.

Edison stated among other things, in its petition, that:

> "So long as there exists any possibility of any contention being made, rightly or wrongly, that the California Commission had by implication concluded that the revised Rock Springs Project and the Edison-TGT Project were mutually exclusive, the action of the Commission so construed, would constitute an unlawful prejudgment of the Edison-TGT Project before the completion of hearings thereon and hence without a fair hearing. This would constitute a violation of Edison's lawful rights and a patent denial of procedural due process of law as guaranteed to it by the Constitution of both the United States and California (cf., Public Utilities Act, Section 1709, and California Constitution, Article I, Section 13, and United States Constitution Fifth Amendment; cf. *Twining v. New Jersey*, 211 U. S. 78, 111-113; *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 323; *American DeForest Wireless Tel. Co. v. Superior Court*, 153 Cal. 533)."

(The Petition For Rehearing is set forth as Exhibit "E" to the Petition For Writ of Review, filed by Edison with the California Supreme Court; see particularly pages 5 and 6 thereof).

The petitions for rehearing, filed by the Edison Company and others, were denied by the Commission, without opinion. (The Commission Order is set forth as Exhibit "F" to the Petition for Writ of Review, filed by Edison with the California Supreme Court.)

The statutes of California provide that after any order or decision has been made by the Commission, any party to the action or proceeding may apply for a rehearing, and if the application for rehearing is denied, the applicant may apply to the Supreme Court of the State for a writ of certiorari or review, for the purpose of having the lawfulness of the original order or decision, or of the order or decision on rehearing, inquired into and determined. (Public Utilities Code, Secs. 1731 and 1756; see Appendix "B" hereto.)

C. Proceedings Before the California Supreme Court.

Your appellant, Edison, timely filed a Petition for Writ of Review or, in the Alternative, for a writ of Mandamus, in the Supreme Court of the State of California. The petition was directed at the Public Utilities Commission, as respondent, and the Southern California and Southern Counties Gas Companies were also served, and joined in the proceeding, as real parties in interest. In this petition, the proceedings before the California Commission were summarized; and

the pendency of the applications of Edison and the California Gas Transmission Company, before the California Commission, was set forth in detail. (Petition for Writ of Review, paras. III, IV, V, VI and VII.)

Edison specifically pointed out, in paragraph XII of the Petition, that although the Commission had itself recognized three principal issues, the findings of the Commission as contained in the supplemental opinion and order, Decision No. 62117, were ambiguous and uncertain with respect to such issues, and did not disclose what the Commission had determined on the matter of exclusion or inclusion of the natural gas requirements of Edison in the market of the Southern California and Southern Counties Gas Companies. (Sometimes referred to therein as "Southern".)

Edison specifically alleged, in paragraph XIV of the petition, that:

> "To the extent that Respondent Commission, in issuing said orders has relied in any way on a conclusion that Southern will continue, after July 1, 1962, to supply the Petitioner's natural gas requirements for its steam plants, the Commission is in effect prejudging Petitioner's separate application to the Respondent Commission for approval of the Edison-CGT Project before the completion of hearings and submission of briefs, the effect thereof being to deprive Petitioner of its property and property rights, without due process of law. To the extent the Respondent Commission, in issuing said orders, presumes that Edison will be required to take its gas from Southern, the order is unlawful and exceeds the Commission's jurisdiction."

Edison prayed for a hearing in the Supreme Court of California on the ground that the opinion and order of the Commission violated the rights guaranteed the Edison Company under Amendment V, and Section 1 of Amendment XIV, to the Constitution of the United States of America. (Petition for Writ of Review, par. XVI.)

The three opinions of the Commission, including No. 62117; the order setting hearing on the request of the Southern California and the Southern Counties Gas Companies for supplemental orders; the petition for rehearing filed by Edison; and the order denying rehearing, were attached to the Edison Company's petition for writ of review or mandamus filed with the California Supreme Court.

Extracts from the transcripts of proceedings before the California Commission, and certain Exhibits, as well as the Opinion and Order of the Commission on an investigation into gas supply and service in California, were attached to a Memorandum of Points and Authorities filed by Edison with the California Supreme Court in support of the petition for writ of review or mandamus.[2]

Neither Respondent Commission, nor the Real Parties in Interest, filed an answer to the petition for writ of review or mandamus, nor were counter-affidavits

[2]Separate petitions for writs of review from the orders and decisions of the Commission were also filed in the Supreme Court of California by the California Gas Transmission Company, and by Richfield Oil Corporation. These petitions were also denied by the Supreme Court of California, without opinion, on January 31, 1962. (57 Advance California Reports No. 10, dated February 9, 1962, at Minutes, p. 1.) The petitions of these parties are not part of the record on this appeal.

filed against the factual material submitted with Edison's memorandum of points and authorities. The Respondent Commission, and the Gas Companies, as real parties in interest, filed briefs in opposition to the petition. The City of Los Angeles also filed a brief in opposition to the Edison petition. These briefs are included in the record on this appeal.

Under the law of California, the allegations of the petition of Edison for writ of review or mandamus were deemed admitted; for in the absence of an answer the sole issue would be whether the allegations of the petition set forth sufficient cause for a writ to issue. (See Witkin, Bernard E.: CALIFORNIA PROCEDURE, Vol. 3, pp. 2549 and 2553.)

The decision of the California Supreme Court denying the petition of Appellant herein, Edison, was therefore based exclusively upon the pleadings; and it is settled that in determining the legal effect of the facts so alleged, as a deprivation of appellant's legal rights under the XIVth Amendment, the Supreme Court of the United States is at as full liberty to consider them as was the state Supreme Court. (*Truax v. Corrigan*, 257 U. S. 312, 324; 66 L. Ed. 254, 259; *Robertson and Kirkham*, Jurisdiction of the Supreme Court of the United States (1951 Ed.), at pp. 204-205.)

It is also settled that such a decision of the California Supreme Court, without opinion, is a final judicial determination of the validity of the order of the

California Commission, and a proper subject for review by your Honorable Court. (*Napa Valley Elec. Co. v. Railroad Commission*, 257 Fed. 197, aff'd 251 U. S. 366, 40 S. Ct. 174, 66 L. Ed. 310; *People v. Hadley*, 66 Cal. App. 370; *Finn v. R.R. Commission*, 2 Fed. Supp. 891; *Wallace Ranch Water Co. v. Railroad Commission*, 47 F. 2d 8.)

FEDERAL QUESTIONS SUBSTANTIAL.

The basic issue presented by this appeal is whether the guaranty of due process of law, set forth in Section 1 of Amendment XIV of the Constitution of the United States of America, extends to proceedings of the state agencies and tribunals, that regulate public utilities. This issue is of vital importance, not only to your appellant, which is itself a state regulated public utility, but also to all similar public utilities, and their customers, investors, and suppliers.

Moreover, the issues of fact posed in the instant appeal are in themselves substantial, for they involve both the interest of the several million customers of your Appellant in efficient and economic electric service, and the interest of related parties, in other states, and in Mexico, in the prosecution of an interstate and international natural gas pipeline, that would provide the adequate and efficient natural gas fuel supply needed for such electric service.

We will discuss these several questions of law and fact below, seriatim.

A. California Statutes Construed as Authorizing State Public Utilities Commission to Issue Certificate Without Fair Hearing of Interested Parties Violated Due Process of Law.

Prior to the instant decision of the California Commission, and the judgment of the California Supreme Court, it had not been contended that the California constitutional and statutory provisions on the state Public Utilities Commission could be construed as authorizing the Commission to issue a certificate of public convenience and necessity without granting interested parties in a contested proceeding a fair hearing, and issuing findings on the issues litigated and submitted for decision. The requirement of a fair hearing, and the issuance of findings, was believed inherent in the status of the Commission, which is a special constitutional tribunal, and also appeared to be required by the applicable statutes.

1. Status of California Commission as Special Constitutional Tribunal.

The California Public Utilities Commission was created by the state constitution, and thereby vested with administrative, legislative, and judicial powers, in the regulation of public service industries. (Cal. Const., Art. XII, Secs. 22, 28.) The state legislature, in the Public Utilities Code, has also conferred administrative, legislative and judicial power on the Commission.

The status of the California Commission as a judicial tribunal under the law of California, has been clearly expressed by the California Supreme Court. In the recent decision of *People v. Western Air Lines, Inc.*,

42 Cal. 2d 621; the Court indicated, at page 632, that while the Commission is not a judicial tribunal in a strict sense, it possesses well established and well understood judicial power. (Statements in a former decision, entitled *Stratton v. Railroad Commission*, 196 Cal. 119, that the Commission was not a court, and that its decrees were administrative or legislative, rather than judicial, were overruled as being inconsistent with other California Supreme Court decisions on the subject of the judicial power of the Commission.)

In a recent commentary, one of the attorneys for the Commission described its status as follows:

> "Although not a judicial tribunal in a strict sense, the Commission is nevertheless both a court and an administrative tribunal. (*Pac. Tel. & Tel. v. Eshleman*, 166 Cal. 640.) Legislative and judicial functions have been united in a single agency (*So. Pac. Co. v. Railroad Comm.*, 194 Cal. 734, 738) . . . While Commission orders in many instances are legislative-administrative in character (as in fixing rates or issuing certificates), it has been said that the procedure by which the result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon those controverted matters 'are strictly judicial.' (*Pac. Tel. & Tel. v. Eshleman*, 166 Cal. 630.)" [Quoted from article by Roderick Cassidy, Assistant Chief Counsel, in the Foreward to the Public Utilities Code of the State of California, published by the West Publishing Company.]

The former President of the California Commission and for many years its chief counsel, Everett C. McKeage, has specifically described the judicial status and functions of the Commission as follows:

> "The Public Utilities Act provides that no state court, except the Supreme Court to the limited extent provided by that Act, has any jurisdiction or power to interfere in any way with action taken by the Commission. In fact, the Commission is both a court of record and an administrative tribunal and, in many instances, exercises purely judicial function, such function having been taken from the courts by the Legislature and deposited with the Commission pursuant to the plenary authority contained in Article XII of the State Constitution." (McKeage, Public Utility Regulatory Law [Vantage Press, 1956] at pp. 106-107.)

2. Statutory Provisions on Findings.

The California statutes applicable to judicial tribunals specifically require findings, and prior to the instant decision it was settled law in California, that failure of a court to make express findings on all material issues raised by the pleadings or otherwise was reversible error. (Code Civ. Proc., Secs. 632, 634; *Frascona v. L. A. Ry. Corp.*, 48 Cal. App. 135, 138; *Engleman v. Greene*, 125 Cal. App. 2d Supp. 882, 886; Witkin, Bernard E., California Procedure, vol. 3, pp. 1833, 1849.) Moreover, the California Public Utilities Code, in Section 310, provides for findings, opinion and orders of the Commission; and in Section 1757 it provides that findings of the Commission on questions of fact shall be final and not subject to review, except by

the state Supreme Court, to determine whether the Commission regularly pursued its authority; with the exception, pursuant to Section 1760, that in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the state Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the determination of the constitutional question shall not be final.

The instant judgment of the California Supreme Court, construing the applicable statutes as authorizing the Commission to issue a certificate of public convenience and necessity without issuing findings on the issues litigated and submitted for decision, is now the conclusive interpretation of such statutes, and a proper subject for consideration by your Honorable Court, upon appeal. As stated in *Robertson and Kirkham*, Jurisdiction of the Supreme Court of the United States (1951 Ed.), at pp. 23 and 24:

> "And in cases where a state court has held a state statute applicable to a particular set of facts, against the specific contention that if applied to such facts the statute is invalid on federal grounds, the Supreme Court has exercised jurisdiction on appeal, the theory being that the state court has construed and applied the statute as though it had in specific terms been made applicable to the precise facts of the particular case, and has thus sustained its validity as so construed and applied."

The record in the cases at bar clearly shows the failure, or refusal, of the Commission to make known its determination, if any, on the material issues litigated and submitted for decision. As noted above, the Commission itself stated, in the second interim opinion, No. 61261, that one of the three principal issues posed by the pending application was whether the project was economically feasible. Notwithstanding this recognition, in the supplemental opinion, No. 62117, authorizing the Rock Springs project, the California Commission failed or refused to make a finding on this issue, and also failed or refused to find whether the decision was based upon an assumption that the gas companies would, or would not, continue to supply the bulk of Edison's need for gas fuel to generate electricity. On the contrary, the Commission merely found, in the language of the statute, that public convenience and necessity required the issuance of a certificate for the California segment of the proposed pipeline project, as revised.

In the petition for review, filed with the California Supreme Court, Edison specifically alleged, in paragraph XII, this failure of the Commission to make findings on the material issues. This allegation was not denied, nor traversed, by the Commission, nor by the real parties in interest, and is therefore deemed admitted. Moreover, the Commission and the two Gas Companies contended in written briefs filed with the Court, that the Statutes did not require any hearing, nor any findings of fact.

(a) *Commission Argument That California Statutes Authorize Granting of Certificate in Exercise of Absolute and Uncontrolled Discretion.*

The Commission argued, in its brief, that once it had recited a finding in the statutory language of "public convenience and necessity", the Decision must be affirmed, and could not be further reviewed by the state Supreme Court. (P. U. C. Br. p. 9.) This argument was based on the proposition that in any proceeding to ascertain whether a proposal is required by the public convenience and necessity the Commission "must necessarily pass upon the validity of estimates, forecasts and predictions."

The Commission further asserted that in certificate cases the sole standard for resolution was public convenience and necessity, which was said to be very broad and flexible, with a meaning different from case to case. It stated that the standard:

> ". . . is a relative thing. The very word 'necessity' does not connote an absolute; but may, depending upon the facts of the case, mean anything from 'indispensable' to 'expedient'. See *San Diego and Coronado Ferry Co. v. R. Comm., supra,* (210 Cal. at pp. 511-512)."

The Commission's claim that the statutes vested it with absolute discretion to grant or deny a certificate was expressed in its argument that utilities which are potential competitors of a utility applying for a certificate of public convenience and necessity had no *constitutional* rights affected by Commission orders granting a certificate to such utility, and it was "at best doubtful" whether such competitors had a *statutory*

right to complain of such orders. It admitted that the Commission had traditionally accorded them due notice and opportunity to be heard. (P. U. C. Br. pp. 11-12.)

The Commission then carried its argument to the logical conclusion, that the statutes did not provide for a hearing either to applicants, or to competitors who did not own existing systems which might be interfered with by the grant of a certificate. On page 27 of its brief, the Commission specifically stated: "Apparently, applications for certificates of public convenience and necessity may be granted or denied with or without hearing."

(b) *Argument That Findings Not Required.*

The real parties in interest, the Southern California and the Southern Counties Gas Companies, argued to the California Supreme Court, in written briefs, that the applicable state statutes did not require the Commission to make findings on the issues litigated in certificate proceedings. The Gas Companies asserted flatly that except in proceedings to determine the compensation to be paid by a public body condemning the property of a public utility, findings by the Commission were not mandatory, but only permissive. (Gas Companies Br. p. 66.)

The constitutional issue that due process of law requires such regulatory bodies and special tribunals as the California Commission to advise the parties of their findings and determinations on litigated issues was squarely argued by both the Commission, and by the two Gas Companies. They both asserted in their

briefs that a "finding" of public convenience and necessity, that is, *a mere recitation of the statutory language*, complied with the constitutional requirement of due process of law. (Commission Br. pp. 13-23; Gas Companies Br. pp. 65-73.) The Gas Companies pushed this argument to the extreme, and asserted, on page 69 of their Brief, that the rule set forth by your Honorable Court in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433, 55 S. Ct. 241, 254, 79 L. Ed. 448, and similar cases,[4] that due process requires findings upon jurisdictional facts, should be dismissed as a dictum.

3. Due Process Requires State Regulatory Agency to Grant Fair Hearing in Contested Matter and Issue Findings on Applications for Certificate of Public Convenience and Necessity.

We have cited the arguments of the Commission and of the Gas Companies above, at length, for in the face of the uncontradicted allegations of your Appellant, it appears that the judgment of the state Supreme Court, being entered without opinion, represents an adoption of the argument that the applicable California statutes do not require the Commission to conduct a hearing, or issue findings, in a contested case involving applications for a certificate of public convenience and necessity.

It is clear that the state statutes, as so interpreted, violate the requirements of due process of law guaran-

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[4] *Wichita R. and Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124; *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549; *United States v. Chicago M., St. Paul and P. R. Co.*, 249 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; *Beaumont S. L. and W. Ry. Co. v. United States*, 282 U. S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221.

tend your Appellant and other parties similarly situated, by section 1 of Amendment XIV of the federal constitution. The argument that a special tribunal, or administrative commission, has the unlimited power to grant or deny a certificate of "public convenience or necessity" has been squarely considered, and rejected, by your Honorable Court. Thus, in *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166, your Court stated that the criterion that in granting radio station licenses the commission should act as "public convenience interest or necessity requires" should not be interpreted as "setting up a standard so indefinite as to confer an unlimited power." Similarly, your court stated, in *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25, 53 S. Ct. 45, 77 L. Ed. 138, 146, that the term "public interest" was not a concept without ascertainable criteria, but had direct relationship to adequacy of service, to essential conditions of economy and efficiency, and to appropriate provision and best use of facilities. (*Cf.* as to the issuance of certificates of public convenience and necessity, *Railroad Commission v. Southern P. Co.*, 264 U. S. 331, 343, 344, 68 L. Ed. 713, 717, 718, 44 S. Ct. 376.)

The argument of the California Commission, adopted by the California Supreme Court, that the concept of "public convenience and necessity" in the California statutes, is very broad and flexible, with a meaning different from case to case, flatly contradicts the rule established by your Honorable Court. The further argument of the Commission and the Gas Companies, apparently adopted by the California Supreme Court,

that the power to grant or deny certificates of public convenience and necessity, delegated by the legislature to the Commission, may be exercised by the Commission without any regard to standards of reasonableness, and arbitrarily or capriciously, and without making findings of fact or disclosing what it has concluded with respect to the litigated issues, also contradicts the rule established by your Honorable Court. In *Wichita R. and Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124, your Honorable Court ruled as to a state public utility commission that: "When therefore such an administrative agency is required, as a condition precedent to the order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

In *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549, your court emphasized that the conclusion of *Wichita R. and Light Co.*, was placed, not only on the language of the state statute, "'. . . but also on general principles of constitutional government." Finally, your court explained the rule as follows, in the case of *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433; 55 S. Ct. 241; 79 L. Ed. 446:

> ". . . due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and if that authority depends on determinations of fact, those determinations must be shown."

The contention that a Regulatory Commission may arbitrarily exercise its powers, without regard to the evidence, was specifically rejected, in the case of *Inter-*

state Commerce Commission v. Louisville and Nashville R.R., 227 U. S. 88, 91, 33 S. Ct. 185, 186, 57 L. Ed. 431. The constitutional guarantee of due process of law applies with equal force to any attempt of a state regulatory Commission to exercise its powers arbitrarily, and without regard to evidence and fact, for as stated in *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."
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> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied, if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'" (Applying the rule of *Interstate Commerce Commission v. Louisville and Nashville R.R.*, 227 U. S. 88, 91 S. Ct. 185, 186, 57 L. Ed. 431, to proceeding of state administrative agency.)

We submit that the state statutes, as construed and applied by the California Supreme Court in the instant case, to authorize the state Public Utilities Commission to arbitrarily grant or deny applications for certificates of "public convenience and necessity", without a fair hearing, and without making findings on issues litigated and submitted for decision, conflict with the Fourteenth Amendment, as conclusively interpreted by your Honorable Court in the cases cited above. The judgment of the California Supreme Court should be overruled.

(a) *Recitation of Statutory Language on Public Convenience and Necessity Not Sufficient.*

As shown above, the Commission and the Gas Companies also argued to the state Supreme Court that the mere recitation in the Commission decision of the statutory requirement on "public convenience and necessity" served as the finding required by the applicable state statutes. The record shows that the California Supreme Court agreed with this construction of the statute, or adopted the argument that the statutes did not require findings, for findings on the issues submitted for decision, are not to be found in any of the three Commission decisions.

A fair reading of the three interim decisions of the Commission, and particularly Decision No. 62117, shows that the statement on "public convenience and necessity" was not considered by the Commission to be a finding of fact. Moreover, such statement would not be considered as a finding under California law, for it is clearly a conclusion of law, which does not disclose the Commission's determination on the

factual issues. (Compare *Clement v. Dunn* (1931), 114 Cal. App. 60, 73; and *Jackson, etc. Co. v. Bryan-Bethany Irrig. D.* (1934), 136 Cal. App. 375, 380.)

Further, a construction of the statutes to provide that recitation of the statutory language served as a finding on litigated issues would contradict the established rule on decisions of regulatory agencies. This rule was well expressed by your Honorable Court in the case of *United States v. Pierce Auto Freight Lines*, (1945), 327 U. S. 515, 533, 66 S. Ct. 687, 696; 90 L. Ed. 821, as follows:

> "The court undoubtedly did not mean that there was no finding whatever as to fitness, willingness and ability, for the Commission did make such a finding in the statutory language. What was obviously meant was that such an ultimate finding was not enough, as of course it was not . . . in the absence of a basic finding to support it . . ."

This established rule has been consistently recognized, heretofore, as being applicable in the review of administrative findings. Thus, in *Stanislaus County v. U. S.*, 193 Fed. Supp. 145, 147, the court held:

> ". . . A general statement in the language of the statute is not sufficient to support the order in the absence of supporting findings of fact. (*State of Florida v. United States* [1931], 282 U. S. 194, 213; 51 S. Ct. 119, 75 L. Ed. 291.)"

In *Stanislaus County*, as in the instant proceeding, the respondents contended that the order contained a narrative report of the facts on which the decision of the Interstate Commerce Commission was based. The

court stated (*Id.*): ". . . Findings in narrative form may be a sufficient compliance with the ICC's duty to report the facts (*Capital Transit Co. v. United States* (D. C. 1951, 97 Fed. Supp. 614), but the Court must review these findings as directed" by the statute.

Finally, it is evident that the decision of the California Supreme Court cannot be sustained on any theory of "implied" findings, on economic feasibility, and other litigated issues. Any such theory of implied findings would be squarely contrary to the decision of your Honorable Court, in *Securities and Exchange Comm. v. Chenery*, 318 U. S. 63, 80 S. Ct. 454, 87 L. Ed. 626, that where a Commission exercising judicial powers has not made a finding on the issues, the court cannot substitute its discretion and make such a finding for the Commission. As stated in *Wichita R.R. v. Pub. Ut. Comm.*, 260 U. S. 48, 59, 43 S. Ct. 51, 67 L. Ed. 124, 130: The lack of an express finding may not be supplied by implication.

It is submitted that the instant decision of the State Supreme Court, construing the state statutes as authorizing the State Public Utilities Commission (a special tribunal), to grant a certificate of public convenience and necessity, after a contested hearing, without determination of the issues litigated and submitted for decision, and without making findings demonstrating that the order is within the authority of the special constitutional tribunal, is squarely contrary to the requirements of due process of law set forth in Section 1 of Article XIV of the Amendments to the United States Constitution.

This decision is of great significance, not only to your Appellant and to the other parties interested in this particular proceeding, but also to other public utilities, and consumers, and to the general public of California, who have a vital interest in the procedure to be followed by the Public Utilities Commission. More importantly, this decision has a vital importance to State administrative proceedings generally, and particularly the regulation of public utilities by state agencies. The instant decision, as shown above, is squarely contrary to the principles set forth by your Honorable Court on procedural due process, guaranteed by the federal constitution, as applicable to state agencies and federal agencies.

F. Prejudgment of Pending Application a Violation of Constitutional Provisions on Due Process of Law.

The second ground on which the decision of the State Supreme Court should be reversed, is that it appears to sanction a statutory procedure permitting the California Commission to prejudge pending applications, and to make determinations on pending contested cases, without a full hearing, and without the receipt of all the evidence, or the presentation of argument by the parties.

As shown above, the Gas Companies attempted, for the first time in the proceedings before the California Commission on the "Rock Springs" project, to show economic feasibility upon the basis of a market showing which included estimated sales of gas to your appellant, Edison, involving quantities that were then already committed under contract to other sources of

supply, and upon which proceedings were pending before the California Commission upon a proposed independent gas supply project, with the presentation of evidence by various interested parties in such latter case not yet then completed.

While it is true, as shown above, that evidence had been presented before the California Commission in both proceedings, upon which the Commission might have concluded that the Southern California market may be able to utilize supplies from both the Rock Springs and the Pemex project, the significant factor in this case, is that Appellant, in simple fairness and justice is entitled to have disclosed what the Commission did in fact conclude upon this vital issue, so as to enable it to protect its legal rights, and to permit a reviewing court to determine what the Commission decided, and whether or not such decision was proper.

Such findings are essential, if your appellant is to obtain a fair hearing, without prejudgment, on its pending application on the Pemex project. As indicated in Edison's Petition for Rehearing (Appendix E to Petition for Writ of Review, or Mandamus), so long as there exists any possibility of any contention being made that the California Commission has by implication concluded that the revised Rock Springs Project was economically feasible only in reliance upon the Edison load[5] or so long as there exists any possibility

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[5]Such contentions have been advanced by the Gas Companies in their response to Edison's Petition for Rehearing before the California Commission, and in their presentation and briefs filed with the Federal Power Commission in the Rock Springs proceedings pending before that Commission (*e.g.*, their statement of position and comments on the Presiding Examiner's special

that the California Commission might ultimately conclude that the Rock Springs Project and the Pemex Project were mutually exclusive, the action of the Commission, so construed, would constitute an unlawful prejudgment of the pending Pemex Project.

The necessity for findings on, and determination of the issue of, economic feasibility of the "Rock Springs" project, without the Edison load, was well stated in a recent decision of the Federal Power Commission in the Rock Springs proceedings pending before it as Docket No. G-16235, *et al.* In its Order issued May 17, 1962, the Federal Power Commission specifically considered the question of whether the Rock Springs project could be decided independently of the "Pemex" project. The Federal Power Commission observed that it had previously ruled that: ". . . . since Southern California Edison Company (Edison) is one of the largest customers of the Southern California Gas Company (Southern) which would be served by the Rock Springs project, and since one of the major objectives of the Pemex project is to provide Edison with a source of gas supply independent of Southern, it would be necessary for El Paso to adduce evidence in the reopened Rock Springs proceeding showing whether or not that project would be economically feasible on the assumption that Edison might cease to be a customer of Southern. Evidence with respect to this issue has presumably been introduced into the record in this proceeding."

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findings, page 23, filed in F. P. C. Docket No. G-16235); and by others (*cf.*: Edison's Memorandum of Points and Authorities in Support of Petition for Writ of Review or, in the alternative, for Writ of Mandamus, page 23, which is a part of this record on appeal).

It then stated:

"We have given further consideration to the relationship between the Rock Springs and Pemex projects in the light of the decisions of the courts in such cases as *Ashbacker Radio Company v. F. C. C.*, 326 U. S. 327; *Midwestern Gas Transmission Co. v. F. P. C.*, 258 F. 2d 660, 666-668 (C. A. D. C.); *Delta Airlines, Inc. v. C. A. B.*, 228 F. 2d 17 (C. A. D. C.); and *Delta Airlines, Inc. v. C. A. B.*, 275 F. 2d 632, cert. denied, 326 U. S. 969. It is our opinion that, even assuming that we might grant the applications in the Rock Springs project if we should determine that that project would be economically feasible and otherwise consistent with the public interest were Edison to be lost as a customer to the companies receiving gas from the Rock Springs project, such action might prejudice the rights of the applicants in the pending Pemex proceeding by resulting in a changed factual situation having a substantial adverse impact upon the likelihood that we could subsequently grant the applications involved in the *Pemex* case. Specifically, we are of the opinion that if the record in Rock Springs indicates there would be a substantial excess capacity in the Rock Springs pipeline for a number of years following its completion (assuming that Southern California Edison is lost as a customer to Southern California Gas Company) this would be a factor which we would necessarily have to take into account in determining whether the public interest would be served by also granting the applications for the Pemex project.

"Such a situation would, in our opinion, bring the present proceedings within the ambit of the *Ashbacker* rule, and require, or at least make advisable, simultaneous consideration of the two proceedings rather than any determination of Rock Springs in advance of Pemex. We recognize, of course, that it might eventually develop that either Rock Springs or Pemex, or both, should be denied on their own merits, irrespective of the impact of the other proceeding, or, conversely, we might eventually determine that both projects should be granted. But as we understand the *Ashbacker* rule, which is essentially a rule of basic fairness, it prescribed that there should be joint consideration of two applications not only where it can be determined in advance that they are in fact mutually exclusive, but also whenever it appears that prior action on one will seriously jeopardize the chance of the other being granted. As the court of appeals stated in *Midwestern Gas Transmission Co. v. F. P. C.*, supra, at p. 668, 'The Commission should not adopt procedures that foreclose full inquiry into broad public questions, either patent or latent.'".

It is clear, as stated by the Federal Power Commission, that the relationship between the "Rock Springs" project and the "Pemex" project is such that a determination of the impact of one case upon the other is essential to avoid prejudgment of the pending application. Any such prejudgment of a pending case is a clear violation of the constitutional provisions on due process of law, and any decision that represents such

prejudgment should not become final. (*Tacining v. New Jersey*, 211 U. S. 78, 111-113; *American DeForest Wireless Tel. v. Superior Court*, 153 Cal. 533.) Heretofore, this rule had been recognized by the courts of California, which have stated that:

> ". . . under the American system of justice it is the policy of our law that a person should not be deprived even of a 'permit' to engage in a legitimate business without a fair and impartial hearing and without an opportunity to present evidence for consideration by the licensing authority . . ." *Irvine v. State Board of Equalization* (1940), 40 Cal. App. 2d 280, 284-285.)

The instant decision, insofar as it may be construed to authorize the California Public Utilities Commission to prejudge a pending application prior to hearing thereon, or prior to the completion thereof, is clearly contrary to both the previous decisions of the state Supreme Court and the decisions of your Honorable Court cited above. As the Federal Power Commission has observed, such prejudgment could also ". . . foreclose full inquiry into broad public questions, either patent or latent." For these reasons, as well, the judgment of the California Supreme Court should be overruled.

1. Due Process Requires Determination of Mutual Exclusivity Prior to Ruling on Application for Certificate.

That special tribunals, authorized to issue certificates of public convenience and necessity, are obliged to keep an open mind until all of the evidence is presented, and

not to prejudge the issues, is settled by the leading decision of your Honorable Court on this subject, *Ashbacker Radio Corp. v. F. C. C.*, 326 U. S. 327, 66 S. Ct. 148, 90 L. Ed. 108, which has been consistently applied to such federal administrative agencies as the Civil Aeronautics Board and the Federal Power Commission.

In the *Ashbacker* case, involving a certificate of public convenience and necessity for the operation of a radio station, your Honorable Court held that determination of the issue of mutual exclusivity is a rule of substance, a fundamental principle of fair play, and flatly stated: "Legal theory is one thing, but the practicalities are different."

Here, as in *Ashbacker*, we are concerned with the practicality of whether the granting of a certificate of public convenience and necessity to the Rock Springs Project, on the present state of the record, could result in prejudicial prejudgment of the issuance of a certificate of public convenience and necessity for the pending Pemex project.

The *Ashbacker* rule clearly requires a determination on the issue of mutual exclusivity, when the allegation is presented before such a special tribunal or administrative body. (*Cf. Northeastern Gas Transp. Co. v. Fed. Power Comm.*, 195 F. 2d 872, 877-878; 881; *Midwestern Gas Transmission Co. v. F. P. C.*, 103 U. S. App. D. C. 60, 258 F. 2d 660, judgment vacated as moot in 358 U. S. 280, 79 S. Ct. 316, 3 L. Ed. 2d 299; (Kenneth Culp Davis, Administrative Law Treatise, vol. 1, page 575, citing *Delta Air Lines v. CAB* [1955], 97 U. S. App. D. C. 46, 228 F. 2d 17.)

In the proceedings before the California Supreme Court the respondent California Commission argued that the *Ashbacker* doctrine did not apply to hearings conducted by the Commission under the California statutes. (P. U. C. Brief, pp. 26-28.) It contended that the *Ashbacker* decision was predicated upon a Congressional mandate to the Federal Communications Commission to afford an applicant a hearing before denial of his application; and that the *Ashbacker* rule did not apply under California law on the issuance of certificates of public convenience and necessity because the California statutes do not guarantee applicants or competitors who do not own existing systems which may be "interfered with" by the grant of a certificate a hearing.

The Gas Companies argued to the Supreme Court of California that the *Ashbacker* doctrine merely concerned "administrative-law jargon" for a form of consolidation of cases (Gas Companies Br., p. 45, footnote 28), and should be judged by the same standards as a consolidation of civil proceedings. (Gas Companies Br. pp. 48-58.)

It is submitted that the *Ashbacker* doctrine is more than a rule of federal statutory interpretation, and is not similar to the civil procedure of consolidation. On the contrary, we submit that in *Ashbacker* your Honorable Court squarely laid down the principal that as a matter of procedural due process of law, an applicant for a certificate of public convenience and necessity is entitled to a hearing, particularly on the issues of public convenience and necessity, and could not be deprived of such hearing nor deprived of a certificate that might

better serve the public than that of competing applicants, on the theory of mutual exclusivity and the accident of a prior filing in point of time.[8] This rule is clearly applicable to proceedings of State tribunals authorized to issue certificates of public convenience and necessity; insofar as the statutes of California are construed by the State Supreme Court as not requiring such hearing (as argued by the California Commission and the Gas Companies) such statutes are clearly invalid under the Federal Constitution.

C. California Statutes Delegating Unlimited Power to State Public Utilities Commission and Precluding State Judicial Review Violate Due Process Clause.

In denying the petition of your Appellant for review of the California Commission decision, in the case at bar, the California Supreme Court apparently construed the applicable state statutes as authorizing the California Commission to issue a certificate of public convenience and necessity without making findings, or disclosing its findings and determinations, on the issues litigated and submitted for decision. As specifically alleged in the Edison petition at paragraphs XIII and XIV, such issues concerned the power of the California Commission to require Edison to continue to take natural gas service from the Gas Companies, and adversely to prejudice and prejudge the pending Edison application for a pipeline project certificate.

To the extent that the California Commission decision is based upon the assumption of a power to re-

[8] (See also Vol. I, Davis Administrative Law, pp. 572-576.)

quire Edison to continue to take natural gas service from the Gas Companies (as a captive customer), or (as an adverse prejudgment of the pending Edison application for a pipeline project certificate, the California Commission has deprived Edison of its property and property rights.

And it is settled that state statutes which do not provide for an independent review, by a state court, of orders of a regulatory commission or special tribunal, confiscating property rights, are void, because of conflict with the due process clause of the Fourteenth Amendment. As stated by your Honorable Court in the case of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908: "In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment." (Accord: *Bluefield Water Works etc. Co. v. Public Service Commission*, 262 U. S. 679, 689, 43 S. Ct. 675, 67 L. Ed. 1176; See also concurring opinion of Justice Frankfurter, in *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U. S. 341, 362, 71 S. Ct. 762, 95 L. Ed. 1002, 1015: "For every state must afford judicial review in its courts of a claim under the Due Process Clause if such claim would give a federal court jurisdiction. In the absence of such judicial review in the State courts, State action under the doctrine of the Ben Avon Case, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527, would be nugatory because unconstitutional.")

Heretofore, it had been firmly established in the law of California that under the State Constitution and the Public Utilities Act the California Supreme Court would exercise an independent judgment on the findings and conclusions of the California Commission when a substantial Federal Constitutional question was involved and appropriately raised. (*Southern Cal. Edison Co. v. R.R. Comm.*, 6 Cal. 2d 737.) In the proceedings before the California Supreme Court in the instant matter, the respondent Public Utilities Commission argued that in certificate cases the mere statement by the Commission that a proposed project was justified by public convenience and necessity precluded any review of the decision whatsoever by the California Supreme Court (Comm. Br. p. 9.) A similar argument was advanced by the Gas Companies. (Gas Companies Br. p. 34.)

Insofar as the California Supreme Court adopted these arguments on Public Utilities Code Sections 1001 and 1005 on the grant of certificates of public convenience and necessity, and Sections 1757 and 1760 on judicial review of determinations of the Commission, as establishing a statutory scheme that would preclude an independent judicial review of federal constitutional questions, the statutes are clearly repugnant to the constitutional provisions on due process, for they are contrary to the decisions of your Honorable Court cited above.

In short, the decision in the instant case appears to construe the applicable constitutional and statutory provisions of California as authorizing the State Public Utilities Commission, in contested proceedings, arbitrarily and without a hearing, to issue a certificate of

public convenience and necessity to one utility, and deny it to another, without a judicial review by the California Supreme Court, or any other branch of the state judicial system, of such determinations." It is submitted that such a statutory scheme clearly violates the federal Constitutional requirement of due process of law.

MATTER MERITS PLENARY CONSIDERATION.

The record shows that the issues of fact and law posed by this Appeal, are of such consequence to the parties directly concerned, and to all other parties concerned with due process in the proceedings of state regulatory agencies that the matter merits plenary consideration, with briefs on the merits, and oral argument.

The issues of law raised by the uncontradicted allegations in the petition filed by Edison with the California Supreme Court: on the economic feasibility of the "Rock Springs" project, and the probability that it would cause an increase in the rates charged by the two gas companies for natural gas service (Petition, par. XII), and on the possible contention of the California Commission that it could require Edison to continue to take natural gas service from the two Gas Companies (Petition, par. XIII), and the constitutional questions as to the prejudgment of the pending Edison application to certify a segment of an interstate and international natural gas pipeline project, are, we believe sufficiently important in themselves to merit such plenary consideration.

The factual issues and consequences are of equal importance, for the matter presented by this appeal involves the rights of several million people, in the third

largest metropolitan area in our country, to efficient and economic electric service, as well as to adequate natural gas service; the construction of an international gas pipeline project that will encourage trade and commerce between this country and Mexico; and a new and independent source of natural gas fuel for the entire Southern California area.

The resolution of these legal and factual issues is not only of importance in the instant proceeding, and to the pending applications for a certificate from the California Commission for construction of the California segment of the Pemex pipeline project. Such resolution would also be pertinent to proceedings now being conducted by the Federal Power Commission, which is considering both the "Rock Springs" project, as Docket No. GP-16235, *et al.*, and the Pemex project as Docket No. CP 61-172 *et al.*

Further, as indicated in the Statement of the Case, *supra*, the Rock Springs project is directly involved with the legality of the merger attempted by the El Paso Natural Gas Company and the Pacific Northwest Pipe Line Co., suppliers of natural gas to the proposed "Rock Springs" project. The federal government, in a suit filed in a United States District Court for Utah, on July 22, 1957, has alleged that El Paso's acquisition of the stock of Pacific Northwest violated §7 of the Clayton Act.[6]

At the previous term, in Docket No. 187, your Honorable Court decided that the Federal Power Commission should await decision in the antitrust suit before taking action on an application of El Paso for a certificate

[6] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. §18.

of public convenience and necessity to acquire Pacific Northwest's assets. (*People of the State of California v. Federal Power Commission, El Paso Natural Gas Company*, 368 U. S. 810, 8 L. Ed. 2d 54, 82 S. Ct. 47.)

In the Brief filed by the People of the State of California, with this Honorable Court, in the *El Paso* case, Docket No. 187, it was stated, at page 28, that the customers of the merged El Paso-Pacific Northwest Co. have been subjected ". . . to rates, charges and service flowing as a result of a potentially illegal combination. The consumer has thus been required to hedge management's bet that the risk of illegality will eventually be obviated." As emphasized at page 48 of the California Brief: "The general stock acquisition offer of El Paso served to 'bail out' the stockholders of Pacific. This weakened El Paso, with no offsetting benefits to El Paso."

The California Brief further asserted, at page 58, that the decision of the Federal Power Commission: ". . . omitted any basic finding permissible from the evidence before it as to the impact of the deficiency of the Pacific system upon the merged system or its impact upon rates. The decision omitted any basic finding as to specific benefits to the customers of the merged systems."

The State of California further asserted that the Federal Power Commission failed to make any specific finding as to "distinct benefits" to the public attainable by the two corporations dealing separately with each.

Finally, California pointed out, at pages 58 and 59 of its Brief, that the Examiner for the Federal Power

Commission had conceded that the prediction of savings was but a "rough estimate of the savings," and contended that "California is entitled to specific findings. Estimates, guesswork, unsupported predictions, matters stated but unproved, are not a sufficient basis for authorizing a merger of this consequence."

Notwithstanding these arguments on the necessity of findings by a regulatory agency, before this Honorable Court by its chief counsel, the California Commission in the case at bar, failed or refused to make findings, or otherwise make known its determination, if any, on the issues which were litigated and submitted to it for decision. Clearly, the arguments of the People of the State of California in the *El Paso* merger case, on the requirement of findings by the Federal Power Commission upon the "economic impact" of the El Paso-Pacific Northwest merger, are equally applicable to this appeal from the judgment of the California Supreme Court on a decision of the California Commission.

Here, as in *El Paso*, a regulatory commission has failed or refused to make any finding on the economic feasibility of the project that is the subject of an application for public convenience and necessity.

The rules applied in the *El Paso* case are, we submit, equally applicable here, for your appellant, and the other interested parties, are entitled to a fair hearing before the California Commission on matters of such importance. Estimates, guess work, unsupported predictions, and matters stated but unproven, are not a sufficient basis to support the decisions that are now before this court on appeal.

CONCLUSION.

This matter has been brought before your Honorable Court by appeal, as permitted by statute, for as applied and construed by the California Supreme Court in this instance, the applicable California statutes clearly violate the plain meaning of due process of law, and the specific rules consistently applied by your Honorable Court in nullifying attempts of regulatory agencies, whether state or federal, to exercise their powers arbitrarily. We recognize that your Honorable Court may also review the instant decision of the California Supreme Court, by certiorari, under 28 U. S. C. Section 1257(3), on the general ground that the authority exercised by California, in this instance, is repugnant to the due process guaranteed by Section 1 of Amendment XIV of the Constitution of the United States of America. If your Honorable Court deems it appropriate, it is prayed to consider these papers as a petition for such writ. (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.) pp. 43-49.)

It is submitted that we have shown above that the issues presented by this appeal are of major significance. The construction placed upon the applicable statutes by the California Commission and the California Supreme Court as authorizing the Commission to issue a certificate of public convenience and necessity without a fair hearing, and with prejudice to a pending application, is contrary to due process of law. If the judgment of the California Supreme Court affirming the Decision of the California Commission is left standing, it will prejudice related proceedings on this matter, the rights of several million people utilizing electric

service offered by your appellant, and could establish a precedent that would lead other state regulatory agencies to engage in an arbitrary exercise of power. Your Honorable Court is prayed to grant this appeal and reverse the judgment of the California Supreme Court.

Dated: September 18, 1962.

Respectfully submitted,

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